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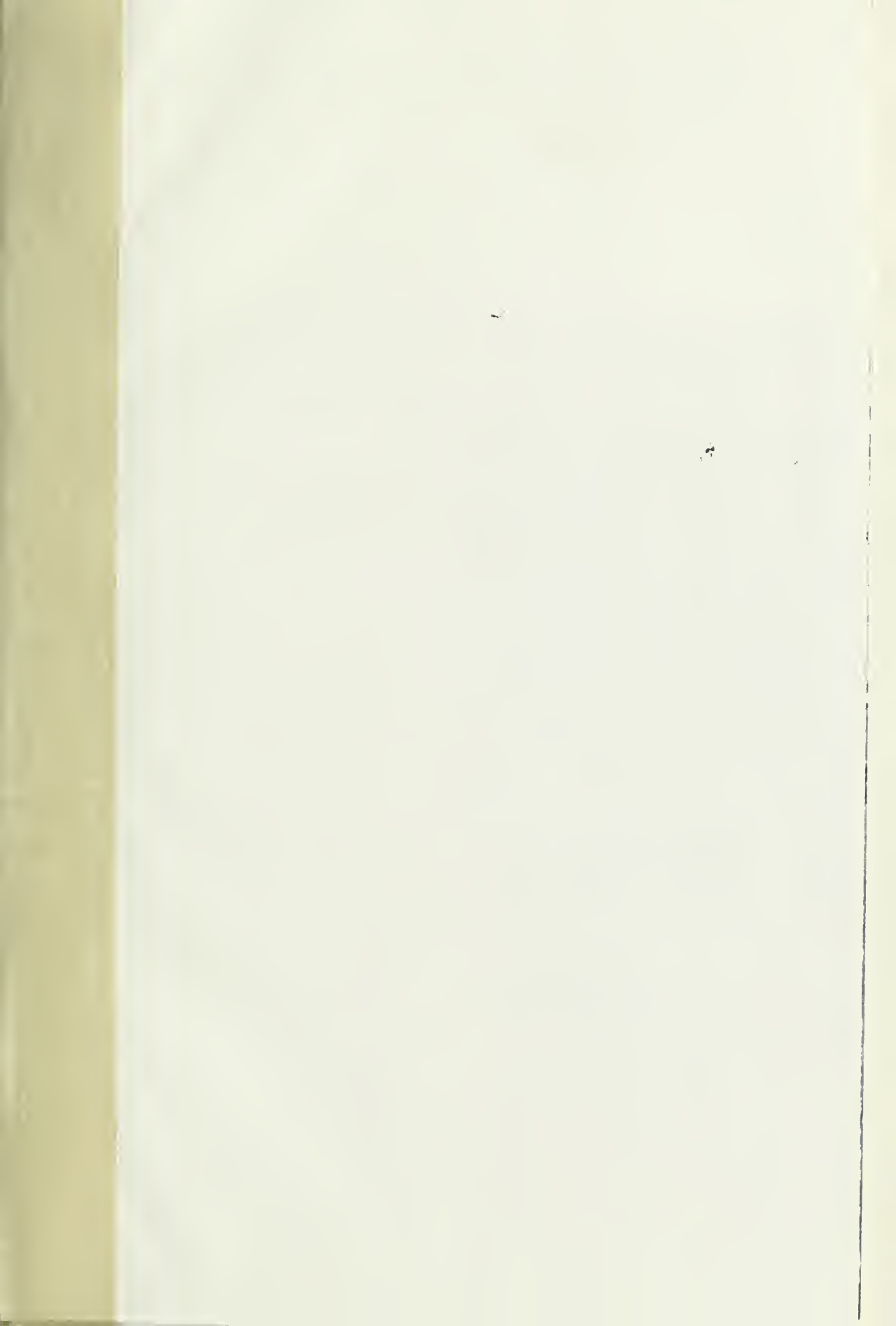
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Illinois Easement Law

Margaret R. Grossman William M. Lopez

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An Agricultural Law Publication

University of Illinois at Urbana-Champaign
College of Agriculture
Cooperative Extension Service
Circular 1202



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Issued in furtherance of Cooperative Extension Work, Acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture. WILLIAM R. OSCHWALD, *Director*, Cooperative Extension Service, University of Illinois at

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SUPPOSE YOU OWN A TRACT OF LAND that is completely surrounded by land owned by other people. The only way you can reach the nearest highway is by using a right of way across your neighbor's property. Suppose, also, that the local utility company uses part of your land for a utility line right of way. Each of these situations involves a legal concept referred to as an easement.

An easement is a property right that allows a person or persons to use part of someone else's land for a specific purpose. The private right of way (which permits one person to use another's land for access) and the public utility easement mentioned above are common examples. The purpose of this circular is to explain the ways in which easements are created and the legal rights of individuals affected by easements. This circular is not intended to be a substitute for legal counsel. If you encounter problems concerning easements, you should seek the advice of an attorney.

So you can discuss easement matters more intelligently with your attorney and others, you should become familiar with some terms commonly used in connection with easement law. Land that is benefitted by an easement is termed the **dominant estate**. For example, if a landowner whose property is otherwise inaccessible has an easement for a right of way across another person's land, the easement owner's property is the dominant estate. The land burdened by an easement is referred to as the **servient estate**. In this example the tract of land that the easement owner crosses is the servient estate.

Easements of this type benefit one parcel of land and burden another. They run with the land; that is, when the dominant land is transferred, the easement is also transferred to the new owner. In contrast, some easements burden land but do not benefit other land. Pipeline or power line easements are examples. These easements, having no dominant estates, usually provide a personal or corporate benefit.

Creation of Easements

There are three kinds of easements: express easements, implied easements, and those created by prescription. This section explains how each kind of easement is created.

Express Easements

An express easement is created by an agreement between parties. A person who wants an easement on someone else's land can negotiate to purchase an express easement. If the landowners reach an agreement, the

easement should be described in a deed and recorded with the county recorder of deeds, just as if the agreement involved the sale of land. This type of easement is sometimes called an express easement by grant.

A person who is selling land can reserve an easement in the land being sold. The reserved easement should be described in the deed, which will be recorded with the county recorder of deeds. This type of easement is sometimes called an express easement by reservation.

When negotiating for the purchase or reservation of an express easement, the parties should clearly understand the rights and limitations of the easement. They should determine its exact course, define its physical dimensions, and specify its duration. In addition, the parties should agree on the intended uses of the easement. For example, if the easement is a private right of way over the land of a neighbor, the parties should decide whether the owner of the easement may use the right of way for farm machinery or only for an automobile.

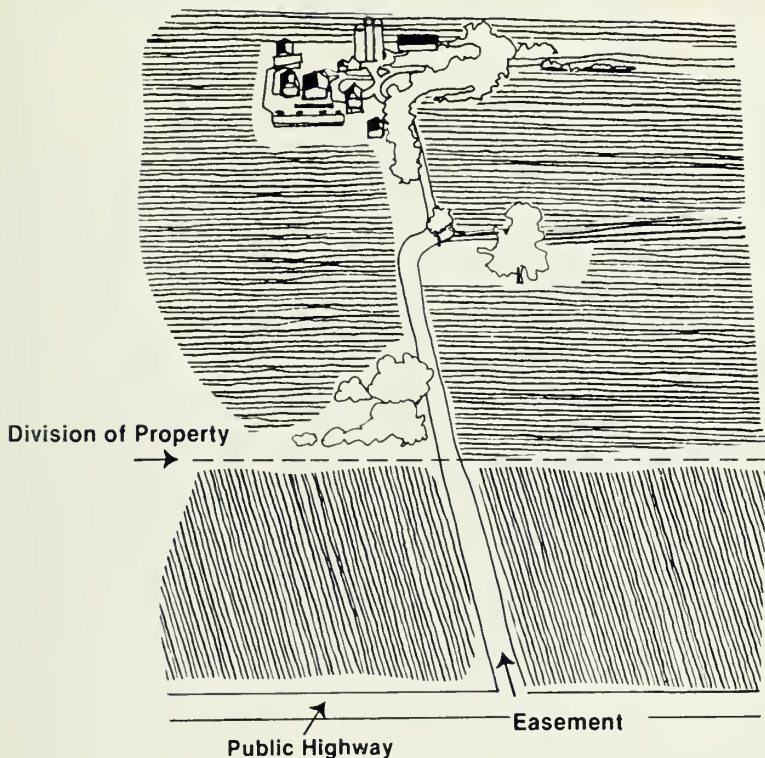
When the easement is clearly defined, the chances of a dispute are small. If a dispute does arise and the parties cannot agree, they may have to go to court to resolve the problem. The court will attempt to carry out the intention of the parties who created the easement. If that intention is not clear, the court will have to decide what the parties intended. The best way to make sure that the easement agreement will be carried out without dispute is to define the easement carefully at the outset. A landowner involved in selling or purchasing an easement should seek an attorney's advice.

Implied Easements

There are two kinds of implied easements. One is the easement implied from prior use, which is sometimes called an easement implied from reasonable necessity. The other is the easement implied from necessity, sometimes referred to as an easement implied from absolute necessity.

Prior Use. Three requirements must be met before an easement may be implied from prior use. First, a prior owner of the land must have divided it into two or more parcels. The implied easement is created, if at all, at the time this division takes place. Second, before the division, the original owner must have used part of the land as an easement would be used. (One does not have an easement in one's own land.) That use must have been obvious and continuous, indicating that the owner intended it to be permanent. Third, the easement must be reasonable and highly convenient for the beneficial use of the dominant land. The easement need not be absolutely necessary for the use of the dominant land before it can be implied from prior use.

Easement Implied From Prior Use



Assume, for example, that a farmer owned a large tract of land. For many years, the farmer lived in a house located on one-half of the property and used a private road crossing the other half to reach a public highway. Of course, the farmer did not need an easement to cross his or her own land, but that use of the land is like the right granted by an easement. The farmer divided the land into two tracts and transferred ownership. The person who bought the tract with the house had an implied easement to use the private road across the other tract in the same way that the farmer had used it, even though the parties made no express grant or reservation of the easement. (See the illustration above.)

The principle on which implied easements are based is that, unless the parties provide otherwise, a conveyance of land includes all of the benefits and burdens existing at the time of sale. In the example above, the easement is a benefit for one owner and a burden for the other that each receives with the purchase of the land. Implied easements are not granted in all cases like the one described here, however. If there is a reasonable alternative to the easement, then it will not be granted.

Once an implied easement is created, it continues indefinitely even if it is not used. It may, however, be lost by abandonment, a subject that is discussed in a later section of this circular.

Necessity. The easement implied from necessity (or absolute necessity) usually arises when a person has a tract of land that is completely surrounded by other people's land. If the landowner could not obtain a right of way over a neighbor's land through an express easement or an easement implied from prior use, the landowner's property would be landlocked. Because this situation would go against the public policy that favors full use of the land, the law permits easements implied from necessity.

To obtain an easement implied from necessity, a landowner must prove that two requirements have been met: first, that a prior owner has divided the land and, second, that the easement is reasonably (but not strictly) necessary for beneficial use of the land. This type of easement requires a higher degree of necessity than the easement implied from prior use.

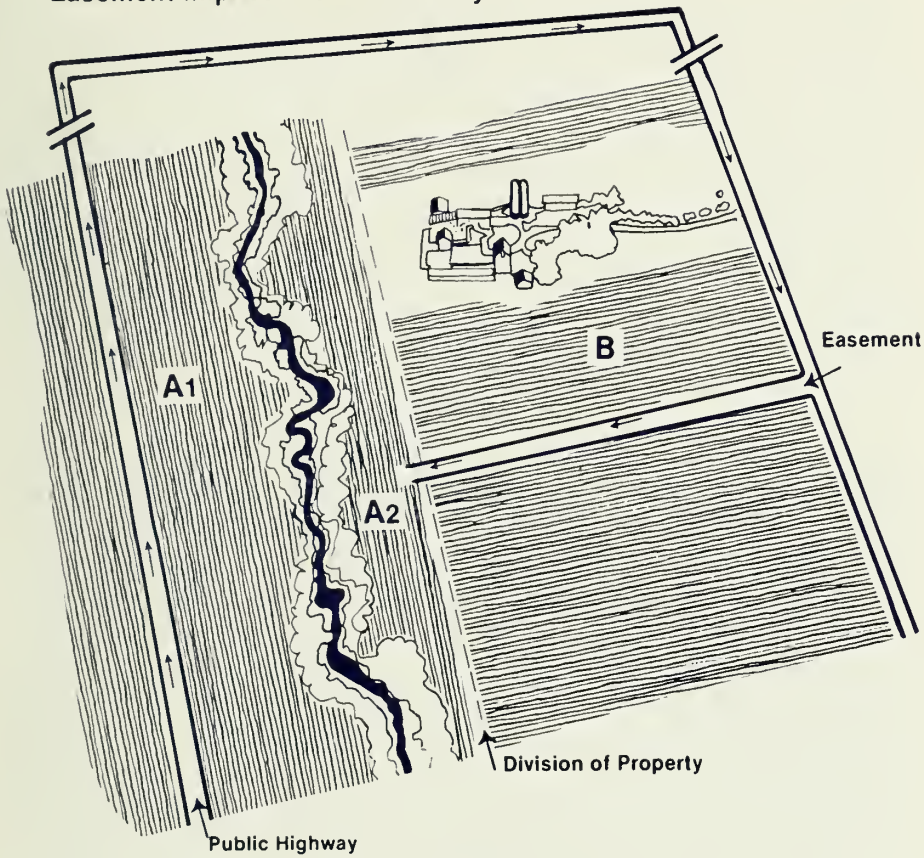
Another significant difference between an easement implied from prior use and one implied from necessity is that the landowner claiming the easement implied from necessity need not establish prior use of the land. Although establishing prior use might help to indicate the necessity of the easement, the person claiming the easement need not show prior use once he or she proves that the property is landlocked.

Like the easement implied from prior use, the easement implied from necessity may lie dormant without being lost, though it can be lost through abandonment. The easement lasts only as long as the necessity for it exists.

An Illinois court decision illustrates the circumstances under which a landowner might obtain an easement implied from necessity. A creek that was impassable because its bridge had long ago collapsed divided a landowner's property into two tracts. The owner had access to one tract, which bordered a public highway, but the other tract was landlocked. The owner sued to establish an easement across the land of her neighbor. Both parcels had originally been owned by one person. Because the cost of a new bridge over the creek was unreasonably high compared to the income from the property, the court granted the landowner an easement so that she could reach her landlocked tract. (See the illustration on page 7.)

In some states, laws provide a means of obtaining access to landlocked property. These laws allow landowners to petition the proper governmental authority to build a road to their property. The person benefitting from the road pays for that benefit, and the person over whose land the road is built receives compensation. Illinois has no law that provides such a method for obtaining a private access road across another person's land to landlocked property.

Easement Implied From Necessity



In the drawing above, property A is divided into two areas (A_1 and A_2). Property A_1 borders a public highway; property A_2 , which is landlocked, is bordered on the west by a creek and on the east by property B. At one time properties A and B formed a single tract. In order to gain access to property A_2 , the owner of that property obtained an easement implied from necessity across property B.

Prescriptive Easements

Easements sometimes arise by prescription. To acquire an easement by prescription, you must show long-standing use of another person's land. The use must have been adverse, uninterrupted for a period of 20 years or more, exclusive, and continuous, and it must have taken place under a claim of right. Once the prescriptive easement arises, the owner of the servient land cannot interfere with the dominant owner's use of the land.

For a use of land to be adverse, it must occur with the knowledge and acquiescence of the owner, but without the owner's permission. Acquiescence is passive assent or submission. Failure of the owner to protest a

neighbor's use of a right of way might be interpreted as acquiescence. If a landowner gives a neighbor permission to cross the land, the neighbor's use of it is not adverse, and a prescriptive easement cannot arise. If the land is vacant, unenclosed, and unoccupied, a court may presume that the land was used with the permission of the owner. To obtain the easement, the neighbor must then prove that he or she used the land without the owner's permission.

In Illinois, if the landowner objects to a neighbor's use of the land, a prescriptive easement cannot arise because the owner has not acquiesced in the use. The law is quite different in some other states, where the landowner's objection, rather than acquiescence or failure to object, is required for a prescriptive easement.

A use of the land is considered continuous if the dominant owner has not stopped using it in response to the servient owner's demands and if the use has not been interrupted by the servient owner. An interruption would prevent the claimant from fulfilling the requirement that the use continue for 20 years. To satisfy that requirement, owners can include periods of prescriptive use by prior owners, as long as there were no interruptions in prescriptive use during those periods.

The requirement that the use be exclusive does not mean that the adverse user must be the only person using the property. Instead, it means that the claimant's use cannot depend on a right granted to someone else to use the property. This requirement of prescription can be satisfied even if some other person also uses an easement (for example, a right of way), as long as the claimant's use is independent of that other person's right.

A claim of right requires that the adverse user openly claim the right to use the land in opposition to the right of the true owner of the property. The actions of the claimant must indicate to others that he or she claims the right to use the easement. If the owner gives the claimant permission to use the property, the use cannot occur under a claim of right.

A number of types of easements may arise by prescription. One of the more important is a private right of way across someone else's land. Illinois law also provides a means of building a public highway by prescription. The usual requirements for a prescriptive easement apply in this situation, but the law shortens the prescriptive period to 15 years of use by the public. Other easements that can be established by prescription are the right to flood someone else's land, an easement for drainage, and an easement to obstruct the natural flow of surface water.

Illinois does provide a way for a landowner to ensure that use of the land by any other person or by the public will not establish a prescriptive easement. The owner can post a sign reading, "Right of access by per-

mission, and subject to control of owner," at each entrance to the property or at intervals of not more than 200 feet along the boundary.

A landowner who wants to prevent someone from acquiring a prescriptive easement, but who does not object if that person uses part of the land, might consider granting a license for that use. The license permits someone to use the land without acquiring any interest in it. A license is ordinarily revocable at any time, and it does not result in a prescriptive right. It applies only to the person who receives the license and cannot be assigned to any one else. A license should include specific information about the land involved, the uses permitted, and other terms to protect both parties. A landowner who wishes to permit the use of land through a license should seek an attorney's help in drafting the license.

Rights and Limitations in Easements

After an easement is established, the dominant owner has the right to use part of the servient owner's land for a specific purpose. Although an easement is a property right, it does not permit unlimited use of the servient owner's land. The easement owner's right is limited by the agreement between the parties, the type of easement, past uses of the easement, and other factors. The limitations include the size of the dominant land to be benefitted, the type of activity on the dominant land for which the easement can be used, and the means of transport used to cross the easement.

Once the location and character of the easement are fixed, neither the dominant nor the servient owner may make material alterations without the agreement of the other. Moreover, after the uses of an easement are defined, the permitted uses cannot be changed without the agreement of the persons involved. The owner of the servient estate may prohibit a misuse of the easement that increases the burden on the servient estate. A grave misuse may result in forfeiture of the easement.

Suppose, for example, that a landowner obtains an easement for right of way over a neighbor's land. The easement holder then buys another tract of land next to the original tract and uses the same right of way to reach the second tract. Because the easement was intended only to serve the original tract of land, the easement holder's actions could constitute misuse of the easement. If the misuse increased the burden on the servient land, the servient owner could prohibit that misuse.

In addition to the right to stop misuse, the servient owner has the right to use the land for any proper purpose, so long as that use does not interfere with the easement owner's proper use of the easement. But the servient

owner cannot obstruct the easement or interfere with its use. Each owner has the right to use the land in accordance with his or her interest.

In the absence of an agreement to the contrary, the owner of the easement has not only the right, but also the duty, to maintain and repair the easement. But the dominant owner cannot materially alter the easement, even for greater convenience, if the alteration increases the burden on the servient estate or interferes with its use. The servient owner is under no obligation to keep the easement in repair. The only duty of the servient owner is not to interfere with the easement.

Scope of Easements

The preceding section contains general comments about rights and limitations that apply equally to most kinds of easements. The following sections explain the scope of particular types of easements.

Express Easements

When an express easement has been granted or reserved, the document setting out the easement should also describe the permitted use of the servient land. The parties are bound by the agreement stated in that document. If its language is ambiguous and a dispute arises, a court has to determine and implement the intention of the parties. When the parties fail to specify the permitted uses or dimensions of the easement, a court will ordinarily limit the uses or dimensions to what is reasonable for the purposes of the easement. To avoid dispute and litigation, the parties to an easement should ensure that the conveyance or agreement clearly specifies the rights and limitations in the use of the easement.

Implied Easements

The rules for implied easements are less clear. It appears that the owner of an easement implied from prior use can use the land only as it was used before the property was divided. Because the easement is implied from the use prior to division and was not negotiated by the parties, this limitation is logical. Nevertheless, some changes in use may be permitted. The easement holder can usually alter the use with the changing times.

For example, even if the implied easement arose during horse-and-buggy days, the current user can drive a car across the easement if it is wide enough. But the easement holder might not be able to drive a large farm implement across it. An easement owner may usually grade or bridge a

right of way. The test used to evaluate change in the use of an easement focuses on the burden on the servient estate. An easement holder may not increase the burden on the servient estate or interfere with its use without the permission of the servient owner.

The issue is more complicated when the easement is implied by necessity. Because prior use is not required for an easement implied by necessity, the scope of the easement is difficult to define. Moreover, Illinois courts have had few opportunities to explore this issue. Courts in other states do not agree on how the question of the scope of easements implied by necessity should be resolved. In some states, the courts attempt to promote full use of the land, but in others they try to minimize the burden on the servient land.

For example, assume that a landowner sold a tract of timberland. The timberland can be reached only by crossing the original owner's land, and the parties did not negotiate for an express easement. The new owner now wants to cut the timber and haul it off the tract, a project that requires the use of heavy machinery. If litigation arose, a court would be likely to grant an easement implied by necessity. It is not so clear what the court would decide about the physical dimensions and permissible uses of that easement. A court promoting full use of the land would grant an easement extensive enough for the large machinery needed in the timber operation. A court that is more concerned about the burden on the servient land would be more likely to grant an easement that permits the landlocked tract to be used only as it was at the time the land was divided. If no timber harvesting occurred then, the easement might be much more limited in scope.

Two trends in Illinois cases may indicate how an Illinois court would decide this issue. First, the decisions indicate a reluctance to allow the holder of an easement to increase the burden on the servient estate. At the same time, however, the courts have tended to make fair decisions that take into account the interests of each landowner. The outcome of a particular case will therefore depend on the facts in that case.

Prescriptive Easements

The scope of a prescriptive easement depends on the extent of the adverse use that created it. Because acquiescence is the key to prescriptive easements, Illinois courts limit a prescriptive easement to that use in which the owner of the servient estate has acquiesced.

Suppose, for example, that a landowner acquiesces, or fails to object, when a neighbor drives across the land to reach a residence. If the use

satisfies the other requirements for prescription, then the neighbor may be granted a prescriptive easement. If the owner of that easement later develops a subdivision, which would substantially increase the traffic crossing the servient estate, a court would probably not allow use of the prescriptive easement for the subdivision traffic. Had the easement holder attempted to use the road in this manner during the 20-year period of prescription, the servient landowner probably would have objected and prevented creation of the prescriptive easement. The servient owner actually acquiesced only in the use that occurred during the 20-year period.

The courts usually limit a prescriptive easement to the use that led to its creation — the use in which the servient owner had acquiesced — to prevent the owner of the easement from using the land in a way that would greatly burden or inconvenience the servient owner. It seems likely, however, that the easement holder would be permitted to modernize or make improvements in his or her use of the land, as long as the changes did not increase the burden on the servient estate.

Termination of Easements

There are several ways to terminate an easement. Some easements terminate automatically according to the terms of the agreements that created them. For example, an easement created to last for a certain period will expire when that period ends. An easement may also terminate by an express agreement, which should be in writing and should be recorded. The dominant owner may release the easement, or the servient owner may purchase the easement from the dominant owner.

Another way to terminate an easement is by merger or unity of title. When the same person holds title to the dominant and servient lands, the easement is extinguished. Unity of title extinguishes the easement because one cannot have an easement in one's own land.

An easement can lie dormant; mere nonuse will not terminate it. But an easement may be terminated by abandonment. Nonuse of the easement, accompanied by circumstances showing that the dominant owner intended to stop using it, constitutes abandonment. For example, a farmer who constructs a fence without a gate at the boundary of an easement may be indicating that he or she intends to abandon the easement. Whether a dominant owner has abandoned the easement is sometimes difficult to decide.

An easement can also be terminated by prescription. An adverse use of the easement that meets the legal requirements of a 20-year period of

prescription will terminate the easement. For example, if a servient owner obstructs an easement for 20 years and satisfies the other legal requirements for prescription, the easement may be terminated.

An easement implied from necessity will terminate when the necessity no longer exists.

Special Easements

Much of the explanation in preceding sections has focused on easements involving rights of way. This section explains briefly some other types of easements. Some of these special easements are covered in more detail by other Cooperative Extension Service circulars.

Pipelines and Power Lines

When a public utility wishes to obtain a right of way over private property, it can purchase an easement from the landowner (an express easement), or it may be able to acquire the easement through condemnation proceedings. When the utility company acquires the right of way, either by purchase or by condemnation, the utility company becomes the dominant owner of the easement, and the landowner becomes the servient owner. The rights of the utility company are superior to the rights of the landowner, but only insofar as necessary for the proper use of the utility line. The utility company may use the easement strip for all utility line operations, but it may not interfere unreasonably with the operations of the landowner. The landowner may use the right of way for all purposes that do not interfere with or damage the utility line. Frequently, the rights of the utility and those of the landowner are stated in the right-of-way contract.¹

Drainage

Easements for drainage can arise naturally, through common law principles, or by statute. If water naturally flows off one tract of land onto another, the owner of the lower (servient) land must accept the drainage and cannot interfere with the natural flow of the water. For example, the servient owner cannot build a dam that backs the water onto the higher

¹ For more information on public utility easements, consult *Power Lines and Pipelines: Accommodating the Agricultural Interest*, Illinois Cooperative Extension Service Circular 1160.

(dominant) land. The dominant owner is permitted to alter the quantity and speed of the water flowing off the land, but cannot alter the natural course of surface water drainage. This ability to affect the quantity and speed of water flow appears to be limited by a requirement that the changes be necessary for good husbandry of the land. In addition to natural drainage easements, a landowner can obtain a common law easement of drainage or of obstruction — either express, implied, or by prescription.

Certain Illinois laws have broadened the rules of natural drainage. These laws provide a procedure through which a landowner can acquire the right to perfect drainage by extending drains across the land of others. The procedure must be followed strictly. Recent developments have led some lawyers to believe that these laws are unconstitutional.

Illinois also has laws concerning drains constructed by mutual license or agreement. If drains fall within the scope of the statute, they create perpetual easements that burden the lands on which the drains are built.²

Solar Easements

People installing solar energy systems want some assurance that new property developments on adjoining land will not obstruct their solar collectors. Illinois court decisions suggest that one property owner may not acquire prescriptive or implied rights to light, air, or ventilation over the land of another. A landowner who plans to construct a solar collector near a boundary line may wish to negotiate with owners of adjoining land for express easements for light and air.

² For a more comprehensive treatment of drainage law, consult *Illinois Farm Drainage Law*, Illinois Cooperative Extension Service Circular 751.











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